Supreme Court, U.S.
FILED
FEB 16 2000
CLERK

(2)

No. 99-882

In The

Supreme Court of the United States

GILBERT COPPER and ADELE NORBERG,

Petitioners,

vs.

CITY OF FARGO, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the separate document requirement of Rule 58 of the Federal Rules of Civil Procedure applies to an order denying a Rule 59(b) motion for a new trial intended to commence the time to appeal.

PARTIES TO THE PROCEEDING

The parties to the proceeding constitute the litigants to the appeal decided by the United States Court of Appeals for the Eighth Circuit. Each party appears below and includes the designation of either "Petitioner" or "Respondent".

Petitioners

Gilbert Copper (Appellee/Cross-Appellant)
Adele Norberg (Appellee/Cross-Appellant)

Respondents

City of Fargo (Appellant)
Kevin Niemann (Cross-Appellee)
Sherri Arnold (Cross-Appellee)

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents City of Fargo, Kevin Niemann, and Sherri Arnold respectfully request that the Court deny the Petition for a Writ of Certiorari (hereinafter "Petition") seeking review of the decision of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals of July 22, 1999 is reported at *Copper v. City of Fargo*, 184 F.3d 994 (8th Cir. 1999).[1] *See* Petitioners' Appendix at A (hereinafter "Pet. App. A"). The District Court opinion in *Copper v. City of Fargo*, Civ. No. A3-93-130 (D.N.D. March 31, 1998), on Petitioner's motion for attorney's fees is unreported. The District Court opinion in *Copper v. City of Fargo*, Civ. No. A3-93-130 (D.N.D. April 10, 1997), on the cross motions for summary judgment prior to the second trial is unreported.

The District Court opinion of December 30, 1994, on the cross motions for summary judgment entered prior to the first trial is reported at *Copper v. City of Fargo*, 905

[1] At the same time the parties appeared for argument on *Copper v. City of Fargo*, 184 F.3d 994 (8th Cir. 1999), the parties also appeared for argument on a companion case, *Veneklase v. City of Fargo*, 1999 WL 1285777 (8th Cir. (N.D.)). In *Veneklase*, the Eighth Circuit addressed the constitutionality of Fargo's home picketing ordinance and ultimately held the same to be constitutional as a content-neutral ordinance enacted to protect the sanctity of the home. *See Veneklase v. City of Fargo*, 1999 WL 1285777 at *3-5.

F. Supp. 680 (D.N.D. 1994). The supplemental opinion of the District Court regarding municipal liability is reported at *Copper v. City of Fargo*, 905 F. Supp. 703 (D.N.D. 1995).

STATEMENT OF THE CASE

A. Facts Underlying The Claims Against Respondents.

On August 20, 1991, Sherri Arnold and Kevin Niemann, two police officers employed by Respondent City of Fargo, responded to a report of a fight outside an individual's residence in a south Fargo residential neighborhood. The officers arrived at the scene and observed a confrontation between abortion protestors picketing the home of a spokesperson for the local abortion clinic. After warning the picketers that arrests would occur if the individuals did not leave the area, and after the picketers refused to leave, the officers arrested the individuals, including Petitioners Gilbert Copper and Adele Norberg (hereinafter "Petitioners"), for violations of Fargo's home picketing ordinance. The state district court dismissed the criminal charges brought pursuant to the home picketing ordinance against Petitioners on constitutional grounds. Although that court found the residential picketing ordinance to be constitutional on its face, it found it to be unconstitutional as applied to Petitioners.

On August 18, 1993, Petitioners filed a Complaint in United States District Court, pursuant to 42 U.S.C. § 1983, naming the City of Fargo, and police officers Kevin Niemann and Sherri Arnold (hereinafter "Respondents"),

as defendants to the action. Petitioners alleged violations of the First and Fourteenth Amendments to the United States Constitution and sought damages against Respondents for Petitioners' arrest and incarceration.

B. Disposition Of The Case In The District Court.

On December 30, 1994, the District Court issued its opinion on the cross motions for summary judgment and dismissed all claims against Respondent Arnold based upon qualified immunity, leaving Respondents Niemann and the City of Fargo as remaining defendants. The District Court held that *Frisby v. Schultz*, 487 U.S. 474 (1988) protected Petitioners' activities and that Petitioners' constitutional rights may have been violated by Respondents Niemann and the City of Fargo. The District Court further determined that a fact issue remained. Therefore, the District Court left undecided whether Respondent Niemann was entitled to qualified immunity and whether Respondent City of Fargo was liable pursuant to 42 U.S.C. § 1983, pending resolution of the factual issue by a jury.

After the jury trial of January 10-13, 1995, and after having made the necessary factual determination, the jury awarded only nominal damages of one ($1) dollar to Petitioners and against Respondent Niemann and the District Court dismissed Respondent City of Fargo from the action. After the trial however, the District Court determined that an erroneous instruction had been given and signaled an intent to grant a new trial. On April 11, 1995, the District Court entered the Notice of Intent to Grant a New Trial. (Pet. App. D). On May 1, 1995, the

District Court entered a Clarification of Intent to Grant a New Trial. (Pet. App. E). The District Court **never** actually ordered a new trial.

On May 10, 1995, the District Court entered final Judgment pursuant to the jury verdict, dismissing Petitioners' claim against Respondent City of Fargo with prejudice and assessing damages of one ($1) dollar against Respondent Niemann. (Pet. App. F). On May 22, 1995, Petitioners timely filed a Motion for a New Trial pursuant to Rule 59(b).[2] On August 14, 1995, the District Court entered a document labeled "Order"[3] wherein the District Court denied Petitioners' Motion for a New Trial. (Pet. App. G).

On September 13, 1995, Petitioners' filed a Notice of Appeal, appealing the District Court's Order denying Petitioners' Motion for a New Trial entered on August 14, 1995. *See* Respondents' Appendix at A (hereinafter "Resp. App. A"). Thereafter on September 27, 1995, Petitioners and Respondents appeared before the District Court for a status conference wherein a discussion of possible new

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[2] Although Petitioners filed the Motion for a New Trial on May 22, 1995, twelve days after the entry of the Judgment, Petitioners satisfied the 10-day requirement of Rule 59(b) due to the inclusion of a weekend for purposes of determining when the 10-day period ran.

[3] In the Petition, Petitioners incorrectly label the Order denying Petitioners' Motion for a New Trial as a "Memorandum and Order". Respondents agree however, that the Order contained both legal reasoning as well as the following language: "IT IS HEREBY ORDERED: 1) Plaintiffs' motion for a new trial on damage issues only is denied." (Pet. App. G).

trial dates occurred. Petitioners subsequently withdrew the previously timely filed Notice of Appeal.

On April 10, 1997, the District Court ruled that Respondent City of Fargo's 1985 home picketing ordinance was unconstitutional as a content-based restriction of free speech pursuant to the Eighth Circuit decision in *Kirkeby v. Furness*, 92 F.3d 655 (8th Cir. 1996). The District Court therefore held Respondent City of Fargo liable as a matter of law pursuant to that decision but dismissed Petitioners' claim against Respondent Niemann on qualified immunity grounds pursuant to the Eighth Circuit decision in *Veneklase v. City of Fargo*, 78 F.3d 1264 (8th Cir. 1996).

On August 21, 1997, the District Court held a second jury trial limited only to damages against Respondent City of Fargo. The jury awarded damages against said Respondent in the amount of one thousand dollars ($1,000) to Petitioner Copper and one thousand one hundred fifty dollars ($1,150) to Petitioner Norberg. The District Court entered the final Judgment on the second verdict on September 8, 1997. (Pet. App. H).

Thereafter, Petitioners moved the District Court for attorney's fees and costs. On March 31, 1998, the District Court awarded attorney's fees in the amount of sixty-seven thousand three hundred five dollars ($67,305.00) and costs in the amount of two thousand ninety-seven dollars and ninety-four cents ($2,097.94). *Id.* Respondent City of Fargo appealed to the Eighth Circuit Court of Appeals and Petitioners' cross-appealed against dismissed Respondents Arnold and Niemann.

C. Decision Of The Eighth Circuit Court Of Appeals.

On July 22, 1999, an Eighth Circuit panel issued an opinion wherein it concluded that the District Court lacked jurisdiction to proceed with a second trial as it failed to issue an order granting a new trial as required by Rule 59. (Pet. App. A at 1-10). The Eighth Circuit therefore reversed the entry of the second Judgment, leaving the May 10, 1995 Judgment intact. *Id.* at 10.

The Eighth Circuit addressed Petitioners' argument, a secondary issue, that the District Court's Order of August 14, 1995, denying the Motion for a New Trial, failed to constitute a final appealable order due to the failure to memorialize the order in a separate document in accordance with Rule 58. *Id.* at 7-8. The Eighth Circuit reasoned that the denial of a motion for a new trial, leaving a previous judgment unaffected, does not fall within the requirements of Rule 58 and that the District Court need not issue a new judgment or enter a separate written order. *Id.* The Eighth Circuit determined that the Judgment of May 10, 1995, duly entered by the clerk along with the Notice of Entry of Judgment, adhered to the requirements of Rule 58. *Id.*

On August 5, 1999, Petitioners filed a Petition for Rehearing with Suggestion for Rehearing En Banc. The Eighth Circuit denied the Petition on August 24, 1999 (Pet. App. B).

REASONS FOR DENYING THE WRIT

The Court should deny the Petition for a Writ of Certiorari for the following reasons. First, the Petition fails to present a significant federal question regarding the applicability of Rule 58 to Rule 59 new trial motions under the facts of the instant case. Second, a split in authority among the circuit courts of appeal does not appear to exist regarding the applicability of Rule 58 to Rule 59 new trial motions. Third, Petitioners timely filed the Notice of Appeal and thereby waived the separate document requirements of Rule 58, and further, the right to challenge the alleged failure of the District Court to adhere to said requirements, if applicable. Finally, a decision by this Court as to whether a separate document should have been entered after the Order denying the Petitioners' Motion for a New Trial will not affect the outcome of this case.

A. A Significant Federal Question Does Not Exist Under The Facts Of The Instant Case.

Petitioners suggest that uniform application of the Rule 58[4] separate document requirement to all post-judgment orders commencing the time to appeal would serve " 'to avoid unnecessary confusion, inefficient marshalling of judicial resources, and, most important, delays in

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[4] Rule 58 states in relevant part: "Subject to the provisions of Rule 54(b): "Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a)." *See* Fed. R. Civ. P. 58.

obtaining or, possibly, actual loss of the right to, appellate review.' " *See* Petition at 10-11 (*citing Michael Zachary, Rules 58 and 79(a) of the Federal Rules of Civil Procedure: Appellate Jurisdiction and the Separate Judgment and Docket Entry Requirements*, 40 N.Y. Law School L.R. 409, 409 (1996)). Respondents agree that uniform application of Rule 58 may be appropriate as the rule exists to create greater certainty in establishing the time for which an appeal from a final judgment should lie.

Respondents disagree however, that this case provides the appropriate vehicle for the Court to consider the applicability of Rule 58 to **all** post-judgment orders. That is, the specific facts of the case, and the status of the law regarding the applicability of Rule 58 to Rule 59 new trial motions, do not warrant the same.

In *United States v. Indrelunas*, 411 U.S. 216, 220-22 (1973) *(per curiam)*, the Court held that the separate document requirement of Rule 58 must be "mechanically applied" to provide certainty as to when an order or a judgment[5] of a court becomes final. In *Indrelunas*, the district court entered the verdict forms on the docket following the conclusion of a jury trial with the following language: "[e]nter judgment on the verdicts. Jury discharged." *Id.* at 218. The district court did not enter a final judgment on the jury verdict for almost two years. *Id.* Under those circumstances, the Court required the entry of a separate document to "avoid . . . the uncertainties as to the date on which" the district court entered

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[5] Rule 54(a) provides in relevant part that " '[j]udgment' as used in these rules includes a decree and any other order from which an appeal lies." *See* Fed. R. Civ. P. 54(a).

judgment. *Id.* The *Indrelunas* Court therefore deemed the failure to enter a separate judgment following the jury verdict as non-compliance with the separate document requirement of Rule 58. *Id.* at 221-22.

In *Bankers Trust Company v. Mallis*, 435 U.S. 381, 383 (1978), the Court considered the issue of whether "a decision of a district court can be a 'final decision' for purposes of [appellate jurisdiction] if not set forth in a document separate from the opinion." Stated differently, the *Bankers Trust* Court considered whether the failure of a district court to enter a final judgment in accordance with Rule 58 automatically deprived an appellate court of jurisdiction. *Id.* The Court identified the "sole purpose of the separate document requirement" as the need for clarification of the commencement of the time for appeal under 28 U.S.C. § 1291.[6] *Id.* To that end, the Court stated that certainty as to timeliness "is not advanced by holding that appellate jurisdiction does not exist absent a separate judgment." *Id.* at 385.

The *Bankers Trust* decision ultimately relaxed the requirements of Rule 58 when a party timely appeals, without objection from the adversary, from a judgment technically not final. *Id.* at 388; *see also Fiore v. Washington County Comm. Mental Health Ctr.*, 960 F.2d 229, 235 (1st Cir. 1992). That is, a party should be deemed to have waived the separate document requirement of Rule 58 where the district court clearly evidenced an intent that an order be final from which an appeal could be taken,

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[6] 28 U.S.C. § 1291 provides that "courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States." *See* 28 U.S.C. § 1291.

and where the party did not object to the taking of the appeal in the absence of the entry of a separate document. *Bankers Trust Co. v. Mallis*, 435 U.S. at 387-88.

In the instant case, the District Court entered the final Judgment following the jury trial and jury verdict on May 10, 1995. Both Petitioners and Respondent knew that each had either 30 days from entry of the final Judgment to appeal the same to the Eighth Circuit or, 10 days within which to bring an appropriate post-judgment motion to the District Court, such as a Rule 59 motion for a new trial. Petitioners filed a timely Motion for a New Trial with the District Court and the District Court issued and entered the Order denying the same. Petitioners then, within 30 days of that Order, filed a Notice of Appeal. Petitioners did not need clarification regarding the finality of the entry of the Order, the reason for the separate document requirement, and Petitioners timely filed the Notice of Appeal.

Under the reasoning in *Bankers Trust*, application of Rule 58 would appropriately be relaxed as Petitioners obviously understood the finality of the Order denying the Motion for a New Trial as Petitioners timely filed the appeal following the Order. For these reasons, this case does not present a significant federal question regarding the application of the separate document requirement to the Order in this case denying Petitioners' Motion for a New Trial, following entry of the final Judgment. Therefore, this case fails to provide the appropriate vehicle to determine whether an order on any post-judgment motion requires the filing of a separate document to avoid unnecessary confusion, inefficient marshalling of

judicial resources, or to avoid delay or actual loss of the right to appellate review.

B. A Split In Authority Among The Circuit Courts Of Appeal Does Not Appear To Exist As To The Application Of The Separate Document Requirement Of Rule 58 In The Context Of Rule 59(b) Motions.

Petitioners assert that a split in authority among the circuit courts of appeal exists regarding the application of the separate document requirement of Rule 58 to all post-judgment orders[7] of a district court. *See* Petition at 11. Petitioners argue that the opinion of the Eighth Circuit Court of Appeals as well as decisions from the Fifth, Seventh, and Eleventh Circuits, sit in "flat contradiction to leading cases in the First Circuit and D.C. Circuit", as well as an unpublished opinion of the Tenth Circuit. *Id.* at 16-19. Petitioners do however, acknowledge that a number of the other circuit courts of appeal have not squarely addressed the issue. *Id.* at 23-28.

At first glance it would appear that the decisions of the First, D.C., and Tenth Circuits directly contravene the decision of the Eighth Circuit in this case, however Respondents respectfully disagree. The applicability of Rule 58 to all post-judgment orders of a district court it is

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[7] As indicated in the first argument, Respondents disagree that this case provides the proper vehicle for the Court to consider the applicability of the separate document requirement of Rule 58 to all post-judgment orders as the facts of the case, as well as the circuit law regarding the applicability of Rule 58 to Rule 59(b) motions, does not warrant the same.

not the issue in the present case. The issue in this case relates to the applicability of Rule 58 to Rule 59(b) motions following proper entry of a final judgment. None of the cases cited by Petitioners squarely support the assertion that a split in the circuits exists. For the reasons set forth below, it does not appear a split in the circuits exists with respect to this question.

1. First Circuit Court Of Appeals.

In *Fiore v. Washington County Community Mental Health Center,* 960 F.2d 229-30 (1st Cir. 1992), the First Circuit considered the effects of a marginal notation in the docket of a denial of a Rule 60(b) motion following a previous decision on summary judgment. Although faced with consideration of the timeliness of an appeal from the denial of a Rule 60(b) motion, the court considered application of the separate document requirement of Rule 58 to motions brought pursuant to Rules 50(b), 52(b), 59(b) and (e) and Rule 60(b). *Id.* at 233-34.

The district court in *Fiore* merely entered a marginal notation on a copy of the summary judgment documents that had been docketed indicating that the court had denied the Rule 60(b) motion. *Id.* The First Circuit ruled, with respect to the timeliness of the Rule 60(b) motion, that the marginal notation on the summary judgment documents entered into the docket denying the motion, failed to comply with the Rule 58 separate document requirement. *Id.* Therefore, the *Fiore* court deemed the appeal to have been timely filed as a separate order had

not been entered to properly commence the time for appeal.[8] *Id.*

Any discussion by the First Circuit regarding the nature of the applicability of Rule 58 to motions brought pursuant to Rules 50(b), 52(b), or 59(b) and (e), constitutes dicta[9] and should not be deemed dispositive as to the suggestion that a split in the circuits exists. Moreover, even the First Circuit recognized that its holding did not necessarily contradict the holding in *Hollywood v. City of Santa Maria,* 886 F.2d 1228 (9th Cir. 1989), wherein the Ninth Circuit held that a district court need not issue a separate document following an opinion and order entered in response to a Rule 59 motion. *Id.* at 235 at FN 9.

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[8] The *Fiore* court denied the motion for summary judgment in March of 1990. *Id.* at 231. The appellant made the Rule 60(b) motion, which the district court denied on June 27, 1990, by means of a marginal notation on a copy of the summary judgment documents previously docketed. *Id.* On October 22, 1990, the district court then entered a memorandum and order holding that the finality of the June 27 decision would be a matter for the First Circuit to consider when and if an appeal occurred. *Id.*

[9] Respondents acknowledge that the opinion of the First Circuit related to the applicability of the separate document requirement of Rule 58 to Rule 50(b), 52(b), and 59(b) and (e) did not occur fortuitously or that it constitutes "inconsequential" dicta as the court received reasoned analysis through amici curiae. However, for purposes of this case, Respondents assert that such reasoning should not be deemed dispositive for determining whether a split in authority among the circuits exists on this specific issue.

Due to *Fiore* having directly decided the appropriate application of Rule 58 to a Rule 60(b) motion only, and that the First Circuit did not necessarily deem its specific decision as contrary to the holding in *Hollywood*, it does not appear that the *Fiore* case properly identifies a split in authority among the circuits as to the application of Rule 58 to Rule 59(b) motions. That is, it does not properly identify a split when a judgment has been properly entered and where a district court denies a Rule 59(b) motion leaving the original final judgment unaffected. Therefore, the Court should not consider it when determining whether a split in authority exists for purposes of determining whether the Petition should be granted.

2. D.C. Circuit Court Of Appeals.

In *Diamond v. McKensie*, 770 F.2d 225, 226 (D.C. Cir. 1985), the D.C. Circuit considered whether a district court order requiring the defendants to the action to place a child in a residential educational facility constituted the final order from which the time to appeal began to run. The order stated that "the [c]ourt will file a [m]emorandum [o]pinion setting forth the reasons for its decision" and that "this [o]rder shall constitute the final order of the [c]ourt." *Id.* Prior to the district court entering its memorandum and order, the appellants filed a Rule 60(b) motion for relief from the initial order. *Id.* The district court did not respond to the motion. *Id.* One month after the initial order, the district court filed its memorandum opinion. Eight days after the issuance of the memorandum opinion, the appellants filed a notice of appeal. *Id.* at 226-27.

The D.C. Circuit concluded that the initial order did not constitute the final order from which the time to appeal began to run, but rather that the memorandum and opinion entered one month later did. *Diamond v. McKensie*, 770 F.2d at 231. The court cited the importance of the separate document requirement of Rule 58 "to avoid speculation as to whether an appellant should or should not have known that the time for appeal had begun to run." *Id.* at 230.

Like *Fiore*, the Rule 58 separate document analysis in *Diamond* did not occur as a result of a jury trial having taken place and a judgment on the verdict having been entered, like in the instant case. It likewise did not occur as a result of the district court having issued an order denying a Rule 59 motion for a new trial, like in the instant case. Moreover, the D.C. Circuit deemed the requirements of Rule 58 to have been satisfied with the entry of the memorandum and opinion, a document that contained legal reasoning and analysis as well as an order of the court, the same type of Rule 59(b) order entered in this case. *Id.* at 230. Therefore, *Diamond* clearly fails to identify a split in the circuit courts of appeal related to the application of the separate document requirement of Rule 58 to Rule 59(b) motions.

3. Tenth Circuit Court Of Appeals.

In *Woods v. Wal-Mart*, 124 F.3d 219, 1997 WL 527668 (10th Cir. 1997) *(unpublished opinion)*, the Tenth Circuit, in an unpublished opinion, appears to follow the reasoning and analysis set forth by the First and D.C. Circuits regarding the application of the separate document

requirement of Rule 58. In *Woods*, the plaintiff appealed from an order of the district court denying a motion to remand several state claims following dismissal on summary judgment of the federal causes of action four months earlier. *Id.* at *1.

The district court summarily denied the motion in a minute order entered on the docket on July 3, 1996. *Id.* The plaintiff filed a notice of appeal on August 5, 1996, outside the 30-day period for appeal specified in Rule 4 of the Federal Rules of Appellate Procedure. *Id.* The plaintiff alleged two reasons for the late appeal. *Id.* The plaintiff argued that the court failed to execute a separate document in compliance with Rule 58 and that the plaintiff never received notice of entry of judgment although an inquiry had been made on numerous occasions regarding the same. *Woods v. Wal-Mart*, 124 F.3d 219, 1997 WL 527668 at *1.

The Tenth Circuit opined that "[an] order effecting the challenged disposition may itself constitute the requisite 'separate document'". *Id.* (*citing Clough v. Rush*, 959 F.2d 182, 185 (10th Cir. 1992)). It reasoned that the minute order entered by the court wherein the court denied the post-judgment motion indeed satisfied the requirements of Rule 58. *Id.* Therefore, the Tenth Circuit deemed the plaintiff's appeal untimely although it ultimately allowed the appeal to proceed pursuant to the "unique circumstances" exception of Rule 77(d). *Id.*

Like *Fiore* and *Diamond*, *Woods* fails to identify a split in the circuits regarding the applicability of the separate document requirement of Rule 58 to Rule 59(b) motions. Therefore, the Court should, like with *Fiore* and *Diamond*,

not consider *Woods* for the purpose of determining whether a split among the circuit courts of appeal exists on this issue.

4. The Fifth, Seventh And Eighth Circuits Appear To Be The Only Circuits To Have Considered Whether The Separate Document Requirement Of Rule 58 Applies To Rule 59(b) Motions When A Final Judgment Was Previously Entered.

Although the various circuits have had difficulty with the applicability of the separate document requirement of Rule 58 to orders entered on post-judgment motions, it appears that only the Fifth, Seventh and Eighth Circuits[10] have considered the issue with respect to a Rule 59(b) motion for a new trial. These circuits have held that a separate document need not be entered to comply with Rule 58. As such, it appears that a split in authority among the various circuits on this specific issue, the issue in the instant case, does not exist.

In *Marre v. United States*, 38 F.3d 823, 825 (5th Cir. 1994), the case relied upon by the Eighth Circuit in this

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[10] Petitioners cite the Eleventh Circuit case of *Wright v. Preferred Research, Inc.*, 937 F.2d 1556 (11th Cir. 1991), as one of the cases which do not apply the separate document requirement of Rule 58 to post-judgment motions. *See* Petition at 22. Respondents have not included any analysis regarding this case as it dealt with the applicability of the separate document requirement of Rule 58 to a Rule 59(e) motion to alter or amend judgment wherein the court did not require a separate document when the district court amends a previous judgment. *See Wright v. Preferred Research, Inc.*, 937 F.2d at 1588.

case, the Fifth Circuit considered whether the separate document requirement of Rule 58 applied to an order denying a Rule 59(b) motion for a new trial.[11] In *Marre*, the district court entered a final judgment and the appellants filed a Rule 59(b) motion for a new trial. *Id.* The district court denied the motion in a written minute entry, entered on the docket, but did not issue a written order as to the same. *Id.*

The appellees asserted that the district court's failure to enter a separate order denying the motion for a new trial rendered the appeal premature under Rule 58. *Id.* The *Marre* court disagreed however, and ruled that "[w]hile Rule 58 clearly requires the entry of a separate, written order, courts generally distinguish between the granting of a post-trial motion and the denial of a post-trial motion." *Id.* The court went on to reason that "[w]hen the court grants a post-trial Rule 59 motion, it affects the judgment, and its new ruling becomes the final judgment. As such, Rule 58 requires a written order. By contrast, the denial of a post-trial [Rule 59] motion leaves the pre-existing judgment unaffected." *Marre v. United States*, 38 F.3d at 825. Therefore, no need exists to issue a new judgment.[12] *Id.*

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[11] The *Marre* court also considered the applicability of Rule 58 to a Rule 59(e) motion to alter or amend judgment as the Government jointly presented the motions to the district court. *Id.*

[12] The court noted that "the Seventh, Ninth and Eleventh Circuits have recognized this distinction and do not require a separate, written order for the denial of a post-trial motion." *Id.*

In *Hollywood v. City of Santa Maria*, 886 F.2d 1228, 1229 (9th Cir. 1989), the district court entered judgment on a jury verdict for the defendant and orally denied the plaintiff's motion for a new trial brought pursuant to Rule 59(b). *Id.* The plaintiff filed the first notice of appeal and the district court subsequently filed a written order denying plaintiff's motion for a new trial. *Id.* The plaintiff then filed a second notice of appeal following entry of the written order. *Id.* at 1229-30.

The order denying the new trial consisted of a nine-page document explaining the legal and factual basis for the court's decision to deny the motion. *Id.* The court titled the document "Order Denying Plaintiff's New Trial Motion". *Hollywood v. City of Santa Maria*, 886 F.2d at 1229. The order concluded with the statement "THEREFORE, plaintiff's motion for a new trial is DENIED. IT IS SO ORDERED." *Id.* The court subsequently served the parties with the notice of entry. *Id.*

The appellant argued that, pursuant to Rule 58, the district court should have filed, in addition to the nine-page order, a separate, one-sentence order stating that the motion had been denied. *Id.* at 1231. The Ninth Circuit disagreed, deeming the entry of the order with the appropriate notations proper and in compliance with Rule 58. *Id.* To that end, the court stated that "[n]either precedent nor logic . . . compels us to hold that entry of such an order is ineffective to trigger the time for filing a notice of appeal simply because the order contains explanatory material." *Hollywood v. City of Santa Maria*, 886 F.2d at 1231.

In *Chambers v. American Trans Air, Inc.*, 990 F.2d 317, 317-18 (7th Cir. 1993), the Seventh Circuit considered whether an order denying a motion for a new trial, or in the alternative, a motion to alter or amend the judgment, complied with the requirements of Rule 58. After the entry of judgment and the submission of the Rule 59(b) and (e) motions, the district court issued an opinion stating that the judge would deny the motion for a new trial and for relief from the judgment and impose sanctions. *Id.* at 317. The district court later issued its opinion regarding the imposition of sanctions but made no mention of the rulings on the Rule 59(b) and (e) motions. *Id.*

The *Chambers* court recognized that in *Charles v. Daley*, 799 F.2d 343, 344 (7th Cir. 1984), it had held that the separate document requirement of Rule 58 did not apply to orders denying post-trial motions, and therefore a separate document need not be entered following such a denial. *Id.* Although at first glance it does not appear as though the *Chambers* court followed the reasoning set forth in *Charles*, closer scrutiny of the facts in *Chambers* indicates otherwise. *Id.* at 318.

Although the Seventh Circuit in *Chambers* acknowledged that it did not require the entry of a separate document following the denial of a post-trial motion in *Charles*, the facts in *Chambers* warranted such an entry. *Chambers v. American Trans Air, Inc.*, 990 F.2d at 318. The district court, in its initial order denying the Rule 59(b) and (e) motions, indicated that a separate order would be issued on the denials. *Id.* The district court then issued the order granting sanctions but without reference to the denial of the other post-trial motions. *Id.* As the *Chambers* court indicates, the litigants would not clearly have

known when the time for filing of an appeal had began to run due to the ambiguity created by the district court.[13] *Id.* Therefore, the Seventh Circuit deemed appellate jurisdiction to be proper. *Id.*

The cases cited above from the Fifth, Seventh and Ninth Circuits, as well as the Eighth Circuit decision at issue in the case, appear to be the only circuit cases wherein the circuit courts have addressed the issue of the applicability of the separate document requirement of Rule 58 to a motion for a new trial brought pursuant to Rule 59(b). Each of these circuits have held that such a separate document need not be entered to comply with Rule 58. As such, it appears that a split in authority among the various circuits on this specific issue does not exist therefore warranting review by this Court.

C. Petitioners Waived The Requirements Of Rule 58 When Petitioners Timely Filed The Notice Of Appeal After The First Jury Trial.

Petitioners allege that the failure to create and enter a separate document after the denial of Petitioners' Motion for a New Trial could have resulted in confusion, judicial

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[13] To this end, the Seventh Circuit stated: "[a]s this case illustrates, district judges must take care, in crafting post-judgment orders, to avoid creating ambiguities concerning the finality and hence appealability of the orders. Such ambiguities create additional work for litigants and for this court; worse, [these ambiguities] can deprive litigants of [the] right to appellate review of adverse judgments. An equal responsibility rests on counsel to seek clarification of ambiguous orders in order to protect [the] client's right to appeal." *Id.*

inefficiency, delays in obtaining, or actual loss of, the right to appellate review. In this case however, any failure by the District Court to enter a separate document after entry of the Order denying Petitioners' Motion for a New Trial did not result in any of the above, especially loss of appellate review, as Petitioners timely filed the Notice of Appeal.

As the leading case cited by Petitioners to support the assertion that a separate document is required, a litigant may be deemed to have waived the requirements of Rule 58 if that litigant successfully files a timely appeal. *See Fiore v. Washington County Comm. Mental Health Ctr.*, 960 F.2d 229, 236 at FN 10 (1st Cir. 1992). Likewise, a litigant may waive the technical application of the separate document requirement of Rule 58. *Id.* at 236. The *Fiore* court reasoned as it did pursuant to the landmark Supreme Court decision in *Bankers Trust Company v. Mallis*, 435 U.S. 381, 387-88 (1978). *Id.*

In this case, Petitioners waived the requirements of Rule 58 when Petitioners perfected an appeal with the filing of the Notice of Appeal. By filing the Notice of Appeal, Petitioners' effectively waived the technical application of the separate document requirement of Rule 58 to the denial of Petitioners' Motion for a New Trial, if it indeed applies. As a result, Petitioners cannot now assert that the District Court failed to adhere to the separate document requirement and that such a failure entitles Petitioners to relief from this Court. As indicated, the purpose behind requiring the entry of a separate document under Rule 58, is to inform the litigant that the time to appeal has begun to run. However, "Rule 58 is not enforced in strictly literal fashion if there is no question

about finality." *Woods v. Wal-Mart*, 124 F.3d 219, 1997 WL 527668 at *2 (10th Cir. 1997).

Obviously Petitioners believed that the time to appeal had begun to run when the District Court entered its Order denying the Rule 59 Motion due to Petitioners having filed the Notice of Appeal exactly thirty (30) days after the District Court entered the Order. Likewise, Petitioners did not suffer any confusion, delay in, or loss of, the right to appeal as Petitioners filed a timely appeal. Finally, Petitioners knew the requirements for filing the appeal and waived any claim under Rule 58 that may have existed regarding the sufficiency of the entry of the Order denying the Motion.

D. A Decision By This Court As To Whether A Separate Document Should Have Been Entered After The Order Denying The Petitioners' Motion For A New Trial Will Not Affect The Outcome Of This Case.

Petitioners assert that the Court should grant the Petition because the District Court did not enter a separate document following the Order denying Petitioners' Motion for a New Trial. Petitioners further assert that, as the District Court never entered a separate document following the entry of the Order denying the Motion, the court failed to issue a final order in the case. Finally, Petitioners suggest that the District Court, in entering the Order denying the Motion, did not intend for that Order to be a final order, but rather the District Court intended to have a second trial on its own terms even though it never entered an order regarding the same. The second

trial did eventually occur,[14] resulting in the underlying appeal to the Eighth Circuit.

The Eighth Circuit decision, on which Petitioners now seek a Writ of Certiorari by this Court, held against Petitioners. The Eighth Circuit did not however, hold against Petitioners on the grounds that a timely appeal had not been filed nor because the District Court failed to enter its Order denying Petitioners' Motion for a New Trial on a separate document. Rather, the Eighth Circuit held that error occurred when the District Court failed to enter an order granting a new trial. Petitioners have not presented this issue to the Court.

Accordingly, even if this Court decided that a separate document should have been entered by the District Court following the Order denying Petitioners' Motion for a New Trial, that holding would not alter the Eighth Circuit's decision. That is, the fatal flaw still exists, in that the District Court never issued an order granting a new trial. As a result, the District Court did not have jurisdiction to conduct the second trial.

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[14] The fact that Petitioners and Respondents continued with the proceedings subsequent to the May 10, 1995 judgment, does not constitute a waiver of the requirement of an order for a new trial and does not confirm jurisdiction on the district court. *See Nugent v. Yellow Cab Co.*, 295 F.2d 794 (6th Cir. 1961), *cert. denied*, 369 U.S. 828 (1961).

CONCLUSION

For all of the foregoing reasons, the Petition for the Writ of Certiorari should be denied.

Dated: February 16, 2000

Respectfully submitted,

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APPENDIX

RESPONDENTS' APPENDIX A – PETITIONERS' NOTICE OF APPEAL FILED SEPTEMBER 13, 1995

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Gilbert Copper and Adele Norberg, Plaintiffs, v. City of Fargo, Kevin Niemann, and Sherri Arnold, Defendants.	)	Civil No: A3-93-130 **NOTICE OF APPEAL**

Notice is hereby given that Plaintiffs Gilbert Copper and Adele Norberg hereby appeal to the United States Court of Appeals for the Eighth Circuit from the District Court's Order denying Plaintiffs' Motion for a New Trial entered in this action on the 14th day of August, 1995.

DATED this 13th day of September, 1995.

Thomas W. Condit
Trial Attorney for the Plaintiffs
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(513) 985-9333

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal was served via regular U.S. Mail upon Mike Miller, Attorney for Defendants, 1129 Fifth Avenue South, P.O. Box 1897, Fargo, North Dakota, 58107-1897 this 12th day of September, 1999.

Thomas W. Condit, Attorney